

REMARKS

Claims 1-20 are pending in the present application.

Claims 1-20 are rejected.

Reconsideration of the claims is respectfully requested.

37 C.F.R. § 1.83(a) (Drawings)

The drawings were objected to under 37 C.F.R. § 1.83(a) as failing to show every feature specified in the claims. This objection is respectfully traversed.

The Office Action asserts that the drawings fail to show “a periphery defined by a first portion having first and second ends and abutting the support along an entire length between the first and second ends when mounted, a second portion distal from the first portion, a third portion extending between the first end of the first portion and the second portion and a fourth portion extending between the second end of the first portion and the second portion” as recited in independent claims 1, 10 and 17.

An annotated copy of the plan view of a tray in Figure 10A follows:

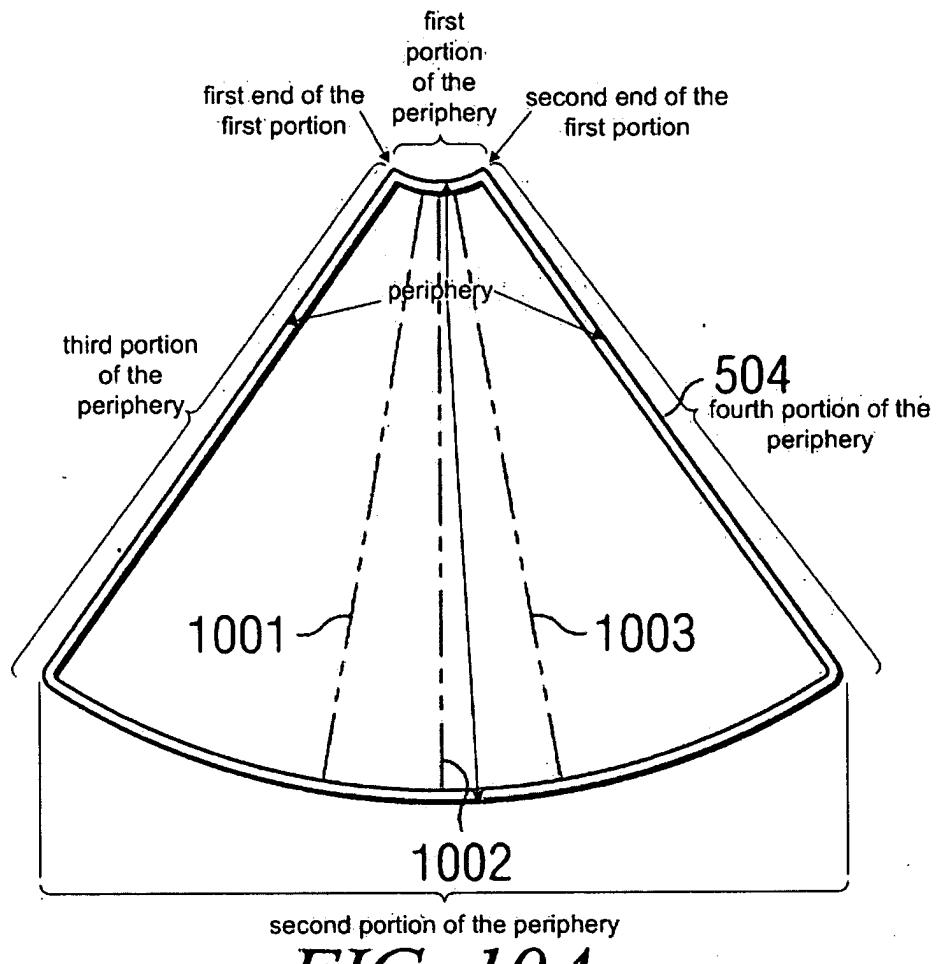


FIG. 10A

As can be seen, the tray has "a periphery defined by a first portion having first and second ends and abutting the support along an entire length between the first and second ends when mounted, a second portion distal from the first portion, a third portion extending between the first end of the first portion and the second portion and a fourth portion extending between the second end of the first

portion and the second portion" as recited in the claims. It should be noted that the term "end" in the English language means, *inter alia*, "a point, line or limitation that indicates the full extent, degree, etc. of something." See *Webster's New Universal Unabridged Dictionary* (Barnes & Noble 1996) at page 641, definition 2 (copy attached). The periphery of the tray depicted includes such "ends" of the portion following the uppermost arc.

Therefore, the objection to the drawings under 37 C.F.R. § 1.83(a) has been overcome.

35 U.S.C. § 112, Second Paragraph (Definiteness)

Claims 1, 10 and 17 were rejected under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter regarded as the invention. This rejection is respectfully traversed.

The Office Action states:

It is unclear as to what end of a portion the applicant is referring to. [sic] In particular, as seen in applicant [sic] Figure 9 the portion do not [sic] end within any contained partitions. Appropriate action is required.

Paper No. 20071001, pages 3–4. However, the periphery of the trays depicted in Figure 9 includes a portion that follows an inside arc abutting the center support when mounted, and that portion of the periphery terminates (ends) where the periphery changes to extending in a radial direction:

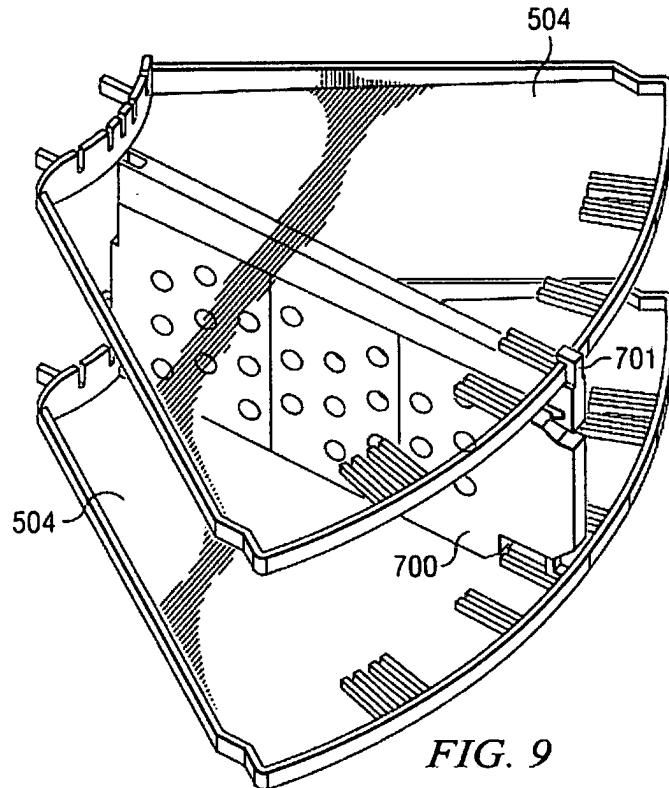


FIG. 9

Therefore, the rejection of claims 1, 10 and 17 under 35 U.S.C. § 112, second paragraph has been overcome.

35 U.S.C. § 103 (Obviousness)

Claims 1–6 and 8–15 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,285,926 to *Falk et al* in view of U.S. Patent No. 4,317,604 to *Kakauer*. Claims 7 and 16–20 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Falk et al* in view of *Krakauer* and further in view of U.S. Patent No. 5,313,393 to *Varley*. These rejections are respectfully traversed.

In *ex parte* examination of patent applications, the Patent Office bears the burden of establishing a *prima facie* case of obviousness. MPEP § 2142, p. 2100-127 (8th ed. rev. 6 September 2007). Absent such a *prima facie* case, the applicant is under no obligation to produce evidence of nonobviousness. *Id.*

To establish a *prima facie* case of obviousness, three basic criteria must be met: First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. *Id.*

Independent claims 1, 10 and 17 each recite that the radially askew tray subdivider extends from a peripheral portion of the tray abutting the center support member when the tray is mounted to a distal portion of the tray's periphery. Such a feature is not found in the cited references, taken individually or collectively. The subdivider in *Krakauer* cited in the Office Action extends only between portions of the tray periphery other than the portion which abuts the support member when the tray is mounted.

The Office Action states:

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the teachings of Falk to include subdividers positioned in a radially askew orientation in a tray as taught by Krakauer because positioning subdividers is [sic] an askew orientation would reduce wastage of tray space.

It would have been further obvious to one of ordinary skill in the art at the time the invention was made to modify the teachings of Falk in view of Krakauer to

position subdividers in a radially askew orientation wherein the subdividers extend [sic] from the inner central portion of the tray to a position on the outer edge of the tray, thus the subdividers are disposed in a radially askew direction to the central support column of the vending machine in order to further customize the tray zone sizes.

Paper No. 20071001, page 6. However, the record contains no support for the conclusory statements within the Office Action, and the “motivation” proposed is nothing more than hindsight reconstruction of the invention, packaging the result of the changes as a purported incentive. Moreover, the Office Action fails to make a determination as to the level of ordinary skill in the relevant art at the time that the invention was made. Accordingly, the rejection is arbitrary and capricious.

Independent claim 5 recites five trays mounted at each of nine levels and spaced approximately five inches apart. This combination of trays, levels and spacing is disclosed in the specification (paragraphs [0030]-[0031]) as allowing placement of soft drink cans and nine inch platters on tray sections. Nothing in the cited references suggests such a combination of these features. In connection with this limitation, the Office Action states:

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer to include only five tray at each level on the center support member (34) versus six trays as specifically taught by Falk (also see 7 trays taught in Krakauer; Figure 2) because a five tray vending machine would be smaller in size and thus require a smaller footprint.

It would have been further obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer to include a distance between each level of the tray platform to be five inches apart. Such a

selection would represent a mere design choice of space required for displaying the target items and be well within the level of skill of an artisan.

Paper No. 20071001, pages 8–9. However, the use of five trays rather than six or seven would not necessarily result in a smaller footprint vending machine. The number of trays employed merely relates to how a 360° area is divided; the footprint of the vending machine will depend more on the radial dimension of the trays, which is not dependent upon the number of trays employed at a given level. With respect to the assertion that five inch spacing between tray levels would be “a mere design choice,” to the extent the Office Action asserts that the recited configuration is *per se* obvious, obviousness inquiries have been deemed not to be amenable to *per se* rules due to their highly fact-specific and fact-intensive nature. *In re Ochiai*, 71 F.3d 1565, 1569 (Fed. Cir. 1995). Mere citation of a *per se* rule regarding what constitutes obvious modifications, without identifying a motivation or incentive for the proposed modification, does not establish a *prima facie* case of obviousness. In addition, the record contains no support for the conclusory statements within the Office Action, and the “motivation” proposed is nothing more than hindsight reconstruction of the invention, packaging the result of the changes as a purported incentive. Moreover, the Office Action fails to make a determination as to the level of ordinary skill in the relevant art at the time that the invention was made. Accordingly, the rejection is arbitrary and capricious.

Independent claim 7 recites a catch on the tray subdivider stopping the vend door. Such a feature is not found in the cited references. The Office Action concedes that none of the cited references teach placing the door catch on the tray subdivider:

Falk et al. does not disclose using a catch on a tray subdivider for controlling the distance of the vend door opening.

Varley teaches of positioning the catch mechanism on the outside of the level tray (Figure 5) but does not disclose positioning the tray latch pin (57) on the partition subdividers.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer and Varley to include (incorporate) latch pins disposed on the subdividers to control the size of access to proximate to the position of the location of the subdividers because the control mechanism will not be need to be calibrated once the sizes of the tray zones is changed as different size products are set to be displayed.

Paper No. 20071001, page 11. The “motivation” proposed in the Office Action improperly employs the teachings of the subject application. Moreover, it should be noted that the latch pin 57 is not a stop for controlling opening of the door, but is instead a mechanism for allowing the user to rotate the shelves 24a, 24b, etc. by opening the door. In addition, the record contains no support for the conclusory statements within the Office Action, and the “motivation” proposed is nothing more than hindsight reconstruction of the invention, packaging the result of the changes as a purported incentive. Moreover, the Office Action fails to make a determination as to the level of ordinary skill in the relevant art at the time that the invention was made. Accordingly, the rejection is arbitrary and capricious.

Therefore, the rejection of claims 1–20 under 35 U.S.C. § 103 has been overcome.

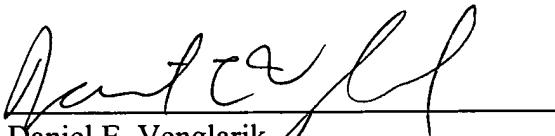
If any issues arise, or if the Examiner has any suggestions for expediting allowance of this Application, the Applicant respectfully invites the Examiner to contact the undersigned at the telephone number indicated below or at dvenglarik@munckbutrus.com.

The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Deposit Account No. 50-0208.

Respectfully submitted,

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